

No. 14650

United States
Court of Appeals
for the Ninth Circuit.

GENERAL CASUALTY COMPANY OF AMER-
ICA, a Corporation,

Appellant,

vs.

SCHOOL DISTRICT No. 5, BAKER COUNTY,
STATE OF OREGON, ex rel. S. C. LYONS,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Oregon

FILED

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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For Appellee.

United States District Court
For the District of Oregon

Civil No. 7067

SCHOOL DISTRICT No. 5, BAKER COUNTY,
STATE OF OREGON, ex rel., S. C. LYONS,

Plaintiffs,

vs.

GENERAL CASUALTY COMPANY OF
AMERICA, a Corporation, and JAMES
LUNDGREN Doing Business as PACIFIC
CONSTRUCTION COMPANY,

Defendants.

PRE-TRIAL ORDER

This matter came on regularly to be heard this 26th day of October, 1953, at Pendleton, Oregon, before the Honorable James Alger Fee, Chief Judge of the above entitled Court, the relator, C. S. Lyons, appeared by Austin Dunn and William L. Jackson, his attorneys, and the defendant, General Casualty Company of America, a corporation, appeared by Justin N. Reinhardt, its attorney, and the following proceedings were had to wit:

Agreed Facts

I.

The action is commenced pursuant to Chapter 324, Oregon Laws of 1945, by School District No. 5 of Baker County, Oregon, for the use and benefit

and upon the relation of S. C. Lyons; both defendants are non-residents of Oregon and the amount involved is in excess of \$3,000.00, exclusive of interest and costs; the defendant, General Casualty Company of America, is a corporation of Washington, doing business in Oregon and having therein a statutory attorney in fact; the defendant, James Lundgren, is a resident of Washington and has been doing business in Oregon under the name of Pacific Construction Company; that defendant, James Lundgren, has not been served with process and is not appearing herein.

II.

On August 7, 1950, defendant, James Lundgren, as Pacific Construction Company, entered into a written contract with School District No. 5, Baker County, Oregon, for construction of a high school and shop building, and on September 29, 1950, entered into a further contract with said School District for construction of a swimming pool and bath house in connection with said high school.

III.

Upon entering into said contract of August 7, 1950, the defendant, James Lundgren, and the defendant, General Casualty Company of America, signed and delivered to the School District a written undertaking. Upon entering into the said contract of September 29, 1950, the defendant, James Lundgren, and the defendant, General Casualty Company of America, signed and delivered to the

School District a further written undertaking in the same identical form except as to the amount of the undertaking involved therein, a copy of which is attached to this Pre-Trial Order and by this reference made a part hereof.

IV.

That the relator furnished the defendant, Lundgren, at Lundgren's instance and request, labor, materials and sheet metal work which was used in the construction of said high school and shop building and the swimming pool and bath house in connection with said high school, and, that the said defendant, Lundgren, paid the relator the sum of \$10,780.60.

V.

That relator paid his employees at the rate of \$1.75 per hour and that his only employees used on the Baker high school and swimming pool were named Griffith, Gilkey and Bumgardner.

VI.

That the time submitted for the employees includes one hour each way for travel time, except on two occasions when relator and his employee, Griffith, were delayed by snow, and on each occasion, the travel time charged amounted to three hours each.

Relators Contention

I.

The relator contends that for labor, materials and sheet metal work furnished, all at the instance and

request of the defendant, Lundgren, there became and is past due, owing and unpaid to relator the sum of \$3,999.58, after allowing defendants all just credits and off-sets, with interest on said sum of \$3,999.58 at the rate of six per cent per annum from the 10th day of July, 1952, until paid.

II.

Relator further contends that under the provision of Chapter 324, Oregon Laws of 1945, and the terms of the bonds attached to this Pre-Trial Order, the said sums due and owing from the defendant, James Lundgren, are also due and owing from the General Casualty Company of America, and that the said Defendant, General Casualty Company of America, is also liable, together with the defendant, James Lundgren, to the relator for a reasonable attorney fee for the institution and prosecution of this suit, and that the sum of \$1,000.00 is a reasonable attorney fee to be allowed and awarded to the relator herein.

III.

Relator contends that he was employed by the defendant, James Lundgren, to furnish the sheet metal work on the Baker high school and swimming pool on or about November 1, 1951; that the defendant, Lundgren, agreed to reimburse the relator for all material used in connection with said work at cost, plus twenty per cent; that defendant, Lundgren, agreed to reimburse the relator for freight charges on material other than between Baker and

La Grande; defendant, Lundgren, further agreed to pay relator the sum of ten cents per mile per trip between Baker and La Grande; defendant, Lundgren, further agreed to pay for labor performed by relator on said Baker high school and swimming pool at the rate of \$4.50 per hour for relator's labor and at the rate of \$3.75 per hour for relator's employees including travel time.

IV.

Relator contends that under the terms of his agreement with defendant, Lundgren, relator furnished materials in the cost of \$4,464.52 and that 20 per cent thereof is \$892.90; that the freight paid by relator other than between Baker and La Grande was in the sum of \$133.39; that the distance between Baker and La Grande at the said time was 50 miles one way and 100 miles round trip; that relator made 52 round trips between Baker and La Grande hauling men and materials, and that the total sum due and owing from defendant, Lundgren, on account thereof is \$520.00; that 877½ hours was performed by relator at the rate of \$4.50 per hour; and 1285½ hours were performed by relator's employees at the rate of \$3.75 per hour, all of said hours being worked by relator and his employees on or between November 6, 1951, and July 3, 1952.

All of the foregoing contentions the defendant denies.

Defendant's Contention

I.

The fair and reasonable value of the labor and material furnished by the relator to the defendant, Lundgren, is not in excess of \$10,780.60. The defendant is not indebted to the relator in any sum whatever.

II.

Relator is not entitled to recover any attorney fee.

III.

The amount claimed by relator for attorney fee is not reasonable.

Issues of Fact to be Determined by the Court

I.

Was there an agreement between the parties. If so, what was it?

II.

What labor and materials did the relator furnish to defendant, Lundgren, at his request?

III.

What was their reasonable value?

IV.

Is Relator entitled to recover an attorney fee? If so, in what amount?

Conclusion

This pre-trial order supersedes the pleadings in this case and is approved by the parties and their attorneys. The pleadings now pass out of the case.

The foregoing pre-trial order incorporates all the issues of law and fact to be tried and determined and is approved by the attorneys and the Court. It shall not be amended after signature except by consent of the parties or by the Court to prevent manifest injustice.

/s/ JAMES ALGER FEE,
Chief Judge, United States District Court for the
District of Oregon.

Dated at Portland, Oregon, this 26th day of October, 1953.

[Endorsed]: Filed October 26, 1953.

[Title of District Court and Cause.]

MEMORANDUM

March 29, 1954

James Alger Fee, Chief Judge:

Relator furnished materials to defendant at an agreed price of cost plus twenty per cent, with the exception of certain doors which were furnished at the rate of cost plus ten per cent. The amount to which relator is entitled on account of materials is \$5,117.82.

Relator furnished labor to defendant at the rate of 774.5 hours of his own time for \$4.50 an hour and 1,169 hours of his employees' time at \$3.75 an hour. The amount to which relator is entitled on account of labor furnished is \$7,869.00.

In addition, relator is allowed \$520.00 for mileage and \$133.39 for freight charges.

Defendant is entitled to credits against the sum owing to plaintiff in the amount of \$10,780.60.

Relator is entitled to reasonable attorneys' fees in the amount of \$1,000.00.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action having been tried before the Honorable James Alger Fee, Chief Judge of the above-entitled Court, without the intervention of a jury, on the 26th, 27th, and 28th days of October, 1953, the relator, S. C. Lyons, appearing in person and by his Attorneys, Austin Dunn and William L. Jackson, the Defendant, General Casualty Company of America, a corporation, appearing by Justin N. Reinhardt, its Attorney, and the Court having heard the evidence of the parties and having considered the exhibits offered and received in evidence, and having taken this action under advisement, and being now fully advised, hereby makes and enters the following:

Findings of Fact

I.

The action is commenced pursuant to Chapter 324, Oregon Laws of 1945, by School District No. 5

of Baker County, Oregon, for the use and benefit and upon the relation of S. C. Lyons; both defendants are non-residents of Oregon and the amount involved is in excess of \$3,000.00, exclusive of interest and costs; the defendant, General Casualty Company of America, is a corporation of Washington, doing business in Oregon and having therein a statutory attorney in fact; the defendant, James Lundgren, is a resident of Washington and has been doing business in Oregon under the name of Pacific Construction Company; that defendant, James Lundgren, has not been served with process and is not appearing herein.

II.

On August 7, 1950, defendant, James Lundgren, as Pacific Construction Company, entered into a written contract with School District No. 5, Baker County, Oregon, for construction of a high school and shop building, and on September 29, 1950, entered into a further contract with said School District for construction of a swimming pool and bath house in connection with said high school.

III.

Upon entering into said contract of August 7, 1950, the defendant, James Lundgren, and the defendant, General Casualty Company of America, signed and delivered to the School District a written undertaking, wherein and whereby James Lundgren, an individual doing business as Pacific Construction Company, principal, and General Casualty Company of America, a Washington

corporation, surety, were held and firmly bound unto School District No. 5, Baker County, Oregon, owner, in the sum of \$975,100.00 for the payment of which said principal and surety bound themselves, their legal representatives, successors and assigns, jointly and severally, that the principal would faithfully perform the contract with owner and pay all persons who had furnished labor or material for use in or about the improvement and would indemnify and save harmless the owner from all cost and damage by reason of principals' default or failure so to do, and that all persons who had furnished labor or material for use in or about the improvements should have a direct right of action under the bond. Upon entering into the said contract of September 29, 1950, the defendant, James Lundgren, and the defendant, General Casualty Company of America, signed and delivered to the School District a further written undertaking in the same identical form except as to the amount of the undertaking involved therein, which was in the sum of \$97,450.00.

IV.

Between on or about November 1, 1951, and July 10, 1952, the relator furnished the defendant, Lundgren, at Lundgren's instance and request, labor, materials and sheet metal work which was used in the construction of said high school and shop building and the swimming pool and bath house in connection with said high school, and, that the said defendant, Lundgren, paid the relator the sum of \$10,780.60.

V.

That realtor furnished materials to defendant, James Lundgren, doing business as Pacific Construction Company, at an agreed price of cost plus twenty per cent (20%), with the exception of certain doors which were furnished at the rate of cost plus ten per cent (10%). The amount to which relator is entitled on account of materials is \$5,117.82. That relator furnished labor to defendant, James Lundgren, at the rate of 774.5 hours of his own time for \$4.50 an hour, and 1,169 hours of his employees' time at \$3.75 an hour. The amount to which relator is entitled on account of labor furnished is \$7,869.00. That defendant, Lundgren, agreed to reimburse the relator for freight charges on material other than between Baker and La Grande, and that relator is entitled to \$133.39 for freight charges. That defendant, Lundgren, agreed to pay relator mileage for trips between relator's shop in La Grande, and the site of the construction in Baker, Oregon, and that relator is entitled to \$520.00 for mileage. That relator is entitled to reasonable Attorneys' fees in the amount of \$1,000.00.

VI.

That under the provisions of Chapter 324, Oregon Laws of 1945, and the terms of the bonds the sums due and owing from the defendant, James Lundgren, to relator herein are also due and owing from the General Casualty Company of America, a corporation.

From the foregoing Findings of Fact, the Court hereby makes and enters the following:

Conclusions of Law

1. The relator is a person furnishing labor and material for use in and about the construction of the High School building of the Plaintiff, School District No. 5, Baker County, Oregon, a public improvement within the meaning of the bond furnished by the defendant, General Casualty Company of America, to said School District, and, as such, is entitled to enforce the provisions of said bond by this action for his own use and benefit.

2. By the provisions of Chapter 324, Oregon Laws, 1945, the relator is entitled to judgment against the defendant, General Casualty Company of America, for Attorneys' fees in addition to the amount recovered for labor and material furnished.

3. By virtue of the furnishing of the labor and material specified in the foregoing Findings, between the dates specified, there became and was and now is past due, owing and unpaid from the defendant, General Casualty Company of America, to the relator in this action the sum of \$2,859.61, and interest at the rate of 6% per annum from the 10th day of July, 1952, until paid, and the further sum of \$1,000.00 reasonable Attorneys' fees, and the costs of the relator herein incurred.

Let Judgment be entered accordingly.

Dated this 18th day of December, 1954.

/s/ JAMES ALGER FEE,

United States Circuit Judge.

Affidavit of Mail attached.

[Endorsed]: Filed December 18, 1954.

In the United States District Court
for the District of Oregon

Civil No. 7067

SCHOOL DISTRICT No. 5, BAKER COUNTY,
STATE OF OREGON, ex rel., S. C. LYONS,

Plaintiffs,

vs.

GENERAL CASUALTY COMPANY OF AMER-
ICA, a Corporation, and JAMES LUND-
GREN, Doing Business as PACIFIC CON-
STRUCTION COMPANY,

Defendants.

JUDGMENT

This action having been tried before the Honorable James Alger Fee, Chief Judge of the above-entitled court, without intervention of a jury, the relator appearing in person and by his Attorneys, Austin Dunn and William L. Jackson, and the Defendant, General Casualty Company of America, appearing by Justin N. Reinhardt, its attorney, and the Court having heard the evidence of the parties and having considered the evidence and the exhibits offered and received in evidence, and having made and entered Findings of Fact and Conclusions of Law, and being now fully advised;

Now, Therefore, based upon the Findings of Fact and Conclusions of Law heretofore entered in this cause, it is hereby Considered, Ordered and Ad-

judged that the Plaintiffs do now have and recover of and from the defendant, General Casualty Company of America, a corporation, the sum of \$2,859.61, with interest thereon at the rate of 6% per annum from the 10th day of July, 1952, until paid, and the further sum of \$1,000.00 reasonable attorneys' fees, and the costs and disbursements incurred by the Plaintiffs in this action and taxed in the sum of \$178.00, for all of which said sums and interest let execution issue.

Entered this 18th day of December, 1954.

/s/ JAMES ALGER FEE,
United States Circuit Judge.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 18, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To School District #5, Baker County, Oregon; the Relator S. C. Lyons, and His Attorneys, Dunn & Jackson:

Notice Is Hereby Given that General Casualty Company, one of the defendants herein and the appellant above named, hereby appeals to the Court of Appeals for the Ninth Circuit from the judgment

entered in this action on December 18, 1954, and from each and every part and the whole thereof.

Dated: December 27, 1954.

/s/ JUSTIN N. REINHARDT,

Attorney for Appellant-Defendant, General Casualty Company of America.

[Endorsed]: Filed January 6, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, F. L. Buck, Acting Clerk, United States District Court for the District of Oregon, do hereby certify that the foregoing documents, consisting of Pretrial Order, Findings of Fact and Conclusions of Law, Judgment, Notice of Appeal, Designation of Record on Appeal, Order to Transmit Exhibits, Amended and Supplemental Designation of Record, and transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 7067, in which General Casualty Company of America is one of the defendants and the appellant, and School District #5, Baker County, State of Oregon, ex rel. S. C. Lyons, is the plaintiff and appellee; that the said record has been prepared by me in accordance with the designations of contents of record on appeal filed

by the appellant, and in accordance with the rules of this court.

I further certify that the cost of filing the notice of appeal is \$5.00, and that the same has been paid by the appellant.

I further certify that there is enclosed a copy of Memorandum of Judge James Alger Fee (not filed) and the reporter's transcript dated October 28, 1953, and one dated October 26-28, 1953.

I further certify that there is being forwarded under separate cover Exhibits 1, 8-A, 9-A, A-1 and B, 12, 13, 14-A-1 and 2, 14-A 3, 4, 5, 6, 7, 8, 14-B, 14-C, 15, 16, 17, 18-A, B and C, 19-A and B, 21, 24 and 25.

I further certify that Exhibits 20-A and 20-B, both blueprints, will be forwarded at a later date by Mr. Justin N. Reinhardt, Attorney for the Appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 9th day of February, 1955.

[Seal] /s/ F. L. BUCK,
 Acting Clerk.

[Endorsed]: No. 14,650. United States Court of Appeals for the Ninth Circuit. General Casualty Company of America, a Corporation, Appellant, vs. School District No. 5, Baker County, State of Oregon, ex rel. S. C. Lyons, Appellee. Transcript of Record. Appeal From the United States District Court for the District of Oregon.

Filed February 10, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 14650

GENERAL CASUALTY COMPANY OF AMERICA, a Corporation,

Appellant,

vs.

SCHOOL DISTRICT No. 5, BAKER COUNTY,
STATE OF OREGON, ex rel. S. C. LYONS,
Respondent.

STATEMENT OF POINTS TO BE
RELIED UPON

Appellant, General Casualty Company of America, a corporation, proposes on its appeal to the United States Court of Appeals for the Ninth Circuit to rely upon the following points as error:

1. The findings of the District Court as to attorney fees, the amount of time for which Relator is entitled to be compensated, and the rate of such compensation are not within the issues submitted, are not supported by, but are clearly contrary to, the evidence and do not support the judgment rendered.

2. The District Court's award of \$1,000 attorney fees is contrary to the stipulation (R.) that \$1,000 would be a reasonable attorney fee if Relator should recover \$5,303.79, the amount he originally claimed, not 54 per cent thereof, which is what the Court allowed. The amount allowed is excessive, particularly in view of said stipulation.

3. There is no evidence to support the finding of the District Court that Relator furnished a certain number of hours at certain rates amounting in all to \$7,869.

No evidence of time spent was offered except the Relator's own records (Exhibits 9-A, 1-A and B, 14-A, B, and C, 15, 19-A and 25). Hence the credibility of witnesses is not involved.

The obvious mutual contradiction among Relator's records led to their complete rejection by the trial court, which found a lower number of hours than appears in any of them. As a result, there is no evidence as to any amount of time on which the Court could have based this finding. But if there were a basis it was not disclosed by the District Court as required by Rule 52 (a) F.R.C.P.

4. The District Court did not disclose the basis of its finding as to rates. Moreover, it did not disclose whether this was an agreed price or reasonable value, although the Pretrial Order explicitly framed that issue for decision by the District Court. Its finding as to rates is contrary to the clear weight of the evidence.

5. The findings of the District Court are clearly erroneous and should be reversed.

Dated February 15, 1955.

/s/ JUSTIN N. REINHARDT,
Attorney for Appellant.

[Endorsed]: Filed February 16, 1955.

[Title of Court of Appeals and Cause.]

APPELLANT'S NARRATIVE STATEMENT
OF TESTIMONY

* * *

S. C. Lyons testified as follows:

“* * * one afternoon * * * Harry Lundgren and a fellow by the name of Shearer * * * came in my shop and asked us if we would be available to complete the sheetmetal work on the Baker High School, as the sheetmetal man hadn't kept up with the work and he wasn't on the job, and they had to have it finished, as winter was setting in. And I said Yes, I would be able to take care of that. * * * and the next morning * * * I went down to Baker. When I got down there I met Mr. Lundgren, Mr. Harry Lundgren, and he says, 'Well,' he says, 'you are too late to do the job.' * * * And I said, 'Well, I don't think that is very nice, just call me down here on a goose-chase.' He says, 'Wait a minute.' He says, 'We have got a smoke vent we have got to have built.' He says, 'Will you build that?' I says, 'Well, it is made out of metal. I imagine we can build it.' He says, 'Well, here it is,' and he showed me the plans. He says, 'Can you build that?' I says, 'Where are the specifications for it?' Well, the specifications were very brief and the detail on the plans was very brief. He says, 'You will have to get in touch with the architects and find out how they want it built.' So I says, 'All right.' He says, 'Well, you will take care of that for us?'

He wanted to emphasize that I would take care of it. I says, 'Yes.'

"That was near the week end, and that week end I went to Portland, and I got in touch with the architects and I saw the details on it was just as brief as those that was on the plan, and they suggested I go to the underwriters to see if they had anything on that smoke vent. That was traced down that the Sperry-Winkler Company in New York built one years ago, and we found a picture of it in slight detail in the underwriters' book, and I made a little sketch from that, and got a mental picture of it, and I went back to the architects and told them what I was going to do. And they says, 'We will check on it on your job as you progress with it.'

"So I went and ordered some materials for the smoke vent to be built and had it shipped to La Grande, and I went back and we started work on it. We was working on that, oh, it was about two weeks after the first contact with the Pacific Construction Company, that I got a telephone call one day, and he asked if I would be available to finish the rest of the sheetmetal work on the Baker High School, as Parker was unable to get the materials. And I said, 'Yes.' * * * So I went to Baker that afternoon and measured up some of the stuff that was in dire need, because winter was setting in. * * * We went to work on it, and near the end of November I went to Mr. Lundgren, Harry Lundgren, and I says, 'What about some money?' * * * He says, 'You just send a bill to the Pacific Con-

struction and they will take care of that.' So we had purchased materials for the smoke vent and the flashings for the roof and other odds and ends, and I had labor to pay, so I took a bill down to Harry Lundgren, and he was in the hotel—he was sick at that time—and he okeyed it, and I sent it in to the Pacific Construction Company. I got a letter from Pacific Construction Company stating that they would like more definite our billing on the job, how it was done, because I just put a lump sum down for so much material and that. So we itemized it out and sent the bill back, and I told them in that letter, Exhibit 14-A-2, just what we was going to charge; that I would be unable to give him a bid on the job, as it was pretty well chopped up, and there was too many odds and ends to be finished up there to give him an accurate bid on the job. And he says, 'Well, I don't expect you to give a bid on it.' He says, 'All I want to do is get the job done.' "

(Exhibit 14-A-2 was received in evidence.)

Q. (By Mr. Dunn): This letter sets out the terms under which you had labored on the job and were continuing to labor?

A. That is right. * * *

The Witness: "I sent that letter to the Pacific Construction Company with the expectation of getting a check in return for some of the money I had put into the job. I didn't get it, so circumstances was bad, and so I went down to the Pacific Construction Company and I told them I needed some

money. 'Well,' he says, 'I am expecting some money in.' But he did give me a check for \$800 at that time. And then I says, 'Now, on that letter that I wrote to you,' I said, 'the terms that I specified in there'—he says, 'Oh, yes. That is fine and dandy.' He says, 'That is all right. I want to get the job done.' So I took my \$800 and went back."

Lyons testified the union scale for labor at that time was \$2.30 per hour; that some contractors were charging \$4.50 per hour for their employees as well as themselves but Lyons charged \$4.50 an hour for himself and \$3.75 for his employees.

Q. When was the first objection raised to your statement?

A. When I presented him the bill for the hollow metal doors. * * * "And Mr. Lundgren complained about the bill. In our agreement it had been 20 per cent on the materials. He says, 'Here, why should I pay you 20 per cent for ordering these doors when I could have done it right here?' I said, 'Well,' I says, 'sooner than have any hard feelings I will just cut that commission right in half,' and I gave him a credit on his statement for just half of my commission on those hollow metal doors. 'Well,' he says, 'that is all right.' * * *

Q. Was there an objection as to the amount of labor you were performing or the materials you were furnishing? A. None whatsoever."

Lyons testified that the distance between Baker and La Grande was fifty miles; that in his charge for labor he included time spent from the time he or his employees left La Grande until they returned

plus mileage at the rate of ten cents a mile. Mileage for 58 such trips charged at \$10.00 each was shown on Exhibit 19-A and Exhibit 21, which was received as a brief and not as evidence.

On cross-examination Lyons testified that under his method of billing, the charge for each of these 58 trips between La Grande and Baker amounted to \$10.00 for mileage, two hours of his own time at \$4.50 an hour, or \$9.00, two hours of his men's time at \$3.75 or \$7.50, and when a second man was involved, an additional \$7.50, or a total of \$26.50, or \$34.00 per trip. He testified that he never discussed with anyone whether he should operate on that basis or keep his crew in Baker on subsistence at \$6.50 a day per man.

On cross-examination, Lyons testified that Mr. Lundgren approved the terms of Exhibit 14-A-2 at the time he paid Lyons the \$800 mentioned in his direct testimony (p. 8) on Lyons' visit to Portland after sending Lundgren Exhibit 14-A-2. Then by reference to his bank book, Exhibit 12, he testified that the \$800 payment was made December 12, 1951. When it was called to his attention that Exhibit 14-A-2 was dated December 31, he testified: "Well, there is a mis-date on this letter, then," and suggested that the letter should have been dated November 31 instead of December 31 because "It was sent previous to the time I got the \$800."

* * *

But immediately thereafter Lyons testified:

Q. And it was after that letter of December 3rd, 1951, from Mr. Lundgren to you (Exhibit 14-A-1)

that you sent him Exhibit 14-A-2, which is your letter of December 31st? A. Yes, sir.

Lyons testified again that Lundgren made no objection to his billings until after February, 1952, when he billed for the hollow metal doors. Lyons' attention was called to Lundgren's letter of January 8, 1952 (Exhibit 18-B), which expressed objections to the bill of December 31, Exhibit 14-A-2. He then testified:

A. No, it was after I got the January 8th letter (Exhibit 18-B) I went down to Mr. Lundgren and talked to him, and I had explained the agreement of December 31st, and he said it was all right. * * *

Q. That is the conversation which this morning you placed at the time of the \$800 payment?

A. That is right, but that was a mistake on my part.

With respect to his testimony that the going rate for labor in La Grande and Baker was \$4.50 an hour, Lyons testified:

Q. Does that mean that that was the going rate to repair a stove in somebody's home?

A. It was the going rate for any kind of job we took. * * *

Lyons testified most of his work is contract work; that during 1951 or 1952 he had no other job of the size of this one and that the largest job outside of this one that he had during 1951 or 1952 was a heating plant in Union, Oregon, for which his total bill was \$1,735. This line of questioning was concluded as follows:

Q. Do you know of any other sheetmetal job in Baker or La Grande which ran to a total bill of more than \$5,000? A. No, sir.

Q. What is the largest sheetmetal job that was done, to your knowledge, in Baker or La Grande?

Mr. Dunn: Your Honor, we object to the materiality of this line of questioning. I can't see what the size of another job has to do with this particular job.

The Court: I think it has gone far enough.

Lyons described the smoke vent (Exhibit 20-A, page 15) for which he billed Lundgren \$3,914.51 (Exhibit 14-C) as follows: A rectangular structure 16 feet 10 inches long about 12 feet wide, 8 feet high, constructed of channel iron and angle iron, covered by sheet metal. The structure has no floor but the sides rest on a curbing above the roof of the school building and are fastened to the curbing with angle iron. The sides flare out so that the dimensions at the top are greater than the dimensions at the bottom. It has a gable roof made of twenty-gauge galvanized sheet iron, lined with fir-tex. The walls are made of two-inch by one-inch channel and angle iron covered with galvanized sheet iron. Attached to the top of these by horizontal hinges and to the roof by fusible links are fire doors made of two-ply shiplap, tin clad, with ribs going up the sides vertically. Between the top of the sheets and the roof are frames that run to hold the roof when the doors are open, and when the doors are closed they are flush with these frames. All this was specially fabricated by the relator at

his shop at La Grande, put together by him once there, taken apart, shipped to Baker and there assembled and installed on the top of the school building.

Lyons was cross-examined in detail on the items in his bills, and discrepancies between them and the supporting documents were pointed out to him. This extends over thirty-five pages of record, during the course of which he acknowledged numerous errors, many of which he said he had known about before signing the Pretrial Order. Finally, the following took place:

Q. May I just see that exhibit for a moment. According to my calculations, those figures which you have read total \$1,171.33, as compared to your cost plus 20 per cent of \$1,135.

A. I knew that discrepancy.

Q. You did? A. Yes.

Q. You knew, then, about the discrepancy in the tin-plate charges and about the discrepancy in the aluminum charges?

A. Yes, sir. I discovered that with Mr. Murphy, when he was here.

Q. I see. Now, in this litigation you have made no adjustments for those mistakes?

A. I have never had a chance to. I have never had a chance to.

Q. Do you wish now, Mr. Lyons, to report to the Court any other mistakes which you have discovered which you want the Court to make allowance for in connection with this case?

A. How is that?

Q. You say you knew about this tin-plate mistake and the aluminum mistake. Are there any others that you want to tell the Court about and save us time here?

A. Well, I don't recall anything right now.

Q. Those are the only errors that you have discovered, or are there others?

A. I imagine there are others, but I don't recall them right now.

The Court: I am not quite sure about the fact that you haven't had a chance to make these corrections. A pre-trial conference was held in this case. You are supposed to represent the true state of facts. Why haven't you had a chance to change it?

The Witness: I mean when we was dealing with Mr. Lundgren.

The Court: Why are you admitting here on the stand that there are mistakes in this account that you knew about before the case was coming on for trial? Those are supposed to be straightened out before you ever get here.

Mr. Dunn: May it please the Court, the over-all charges in this matter actually total more than the amount that we prayed for. We didn't adjust down to it, feeling that we would be bound by the amount that we prayed for of \$5,303. Actually, the total charges will come to more than that, when the whole thing is totaled.

The Court ordered a recess. During the recess, the amount claimed by the relator was reduced by him from \$5,303.79 to \$3,999.58, and immediately

following the recess the relator offered Exhibit 25, which was received in evidence as his summary of his charges against the defendant Lundgren.

(Plaintiff rested.)

Harold Hendricks was called by the defendant and testified that he has been in the sheet metal business in Pendleton continuously since 1933, except for three years when he did sheet metal work in the armed services, and has owned his own business, named Thews Sheet Metal Inc., since 1947. He testified that he is familiar with practices and rates and charges for sheet metal work in the area of Pendleton, Baker and La Grande; that a reasonable price for the smoke vent built by the relator between November, 1951, and the spring of 1952 would have been \$1,200.00.

Q. In other words, that would be the price for fabricating the structure, putting it together, and placing it on the roof of the building?

A. That is right.

Q. Now let me ask you this: As to your procedure in carrying out such an order, would it be your procedure to fabricate the parts of this structure in your shop and then put them together to see if they fit, and so on, and then take it apart for transporting, and take it down to Baker and put it up on the structure? Is that in general the way you would handle the job?

A. Yes, that is in general.

Q. Do you have any estimate of the amount of time that would be required for this job that we are

talking about, and, if you can, break that down between shop time and Baker time.

A. Well, I would say that it would take approximately, oh, ten 8-hour days to construct the thing in the shop, and approximately the same length of time on the job.

Q. That would require travel between Pendleton and Baker?

A. Well, it would require one trip to Baker and one trip back. * * *

A. The men would stay in Baker until the job was completed and then return.

Q. How have you calculated in your estimate provision for the cost of that trip and the time that the men would spend there?

A. Well, we charge mileage at 10 cents a mile, and then the men receive \$6.00 a day maintenance money.

Q. And that is included in this over-all figure of yours? A. That is included.

He testified that the standard method of estimating and computing charges for sheet metal in the area of Baker, La Grande and Pendleton during the period 1951-2 was to take the cost of material, the cost of our labor, plus 7% for labor insurance, 20% for overhead and a percentage for profit, which would be fixed by negotiation at 15% or 20% plus mileage and maintenance at \$6.00 a day. Using that method, he arrived at a figure of \$1,200.00 for the smoke vent, and that is the method that would normally be used in computing the charges for such

a job. But "if it is shop work, why, then we have a flat hourly rate that we charge," which was \$4.50 in 1951 and 1952.

Q. That is the rate that you charge, you say, for small custom jobs? A. Job work, yes.

Q. But that is not the method that would be used, then, in billing for the kind of a job that we are talking about like this smoke vent?

A. No, no. At least we wouldn't do it that way.

Q. And the reason for that is what?

A. We are getting a little better deal than on job work, for the very reason that it is the small jobs where a man moves from job to job, and he loses time, where if he is on a big job, why, he is right there and there is no lost motion.

Q. Now, this job rate figure which you mentioned of \$4.50 or \$4.65, as the case might be, is that geared at all to the cost of your labor?

A. Yes.

Q. What labor cost is that \$4.50 figure based on?

A. That was in '52, wasn't it? I said \$4.50 would have been 1952. It was about \$2.55, somewhere along there.

Q. In other words, when your labor cost was \$2.55 an hour, your shop work rate was \$4.50 an hour? A. That is right.

Q. If your labor cost were lower, would your shop work rate be lower?

A. That is right. It would go lower.

Q. In general in the same proportion?

A. Yes. * * *

Q. Now let me ask you this: In the figure that

you have given on this hypothetical smoke vent, can you state what proportion of that is labor and what proportion of that is material, approximately?

A. Well, that would be, I would say, awful close to a 50-50 proposition. You would have almost as much material in it as you would labor.* * *

Q. So far as your billing practice is concerned, is it your practice to bill at a higher rate for one of the men if there are only three men on the job?

A. No, if there is only three men on the job, they get their regular scale and it is billed that way. If there is four, and one of them is designated as foreman, he gets foreman's wages, which I believe is 25 cents an hour more. That is all taken into consideration when you are figuring the job.

On cross-examination, Mr. Hendricks was asked: If your firm had been employed to build the smoke vent, to put the ceilings in the shower rooms, do most of the flashing, and build some scuppers, goose-neck vents, do the coping and the trim, the porch flashing, swimming pool flashing and trim, and build downspouts, and all of these without a contract, on labor and materials, you would then charge exactly the amount of hours that you put in on the job, plus your materials, plus your overhead as you have given the formula to us on your direct examination; is that correct? A. That is right.

Q. Now, the charge for yourself actively participating in the job and of your men would be \$4.50 an hour under those circumstances?

A. No.

Q. What would it be?

A. I think I follow your question correctly. You would charge your labor out at a labor cost, not a \$4.50-an-hour rate. Then you would have your labor and your material cost, and so on, just the same as though you were bidding the job. In other words, the contractor wants to know how much this material is, and how much labor you had, and what everything is. So you break it down so much for material and so much for labor at cost.

Q. And then you add——

A. Then you add your percentage.

Q. Which at that time was 20 per cent?

A. Well, that again raises another question. I don't know. I never found a job like that. I couldn't say. It was designated by the contractor and myself as to how much before I was going to get the job. In other words, what we call cost-plus, and it is before we ever go to work on the job we say that we will go on the job and we will do it at cost-plus-10 or cost-plus-15. So in order to break our costs down we have our labor at cost and our material at cost.

Q. Then you add your overhead?

A. Then we add our overhead, and that runs the total cost of your job. To that then you add the percentage that has been set between you and the contractor.

Q. Now, part of the work that you would do on a job of that nature would be done in your shop, taken up there and placed on the job, and part of it would be done on the job. It is 50 miles away. Under those circumstances would you travel be-

tween your job and the building, or would you go to the building and charge maintenance for your men?

A. We would go to the building and charge maintenance, because that is cheaper for the general contractor.

Q. If you had a rather lengthy period that you would have to be on the job?

A. That is right.

Q. But if it were a day here and a day there, a day of shop work and then a day on the job, you would not go to the job and charge it that way, would you?

A. No. No, because you would not leave your men sitting in La Grande with nothing to do, or Baker, or wherever you were going.

Q. Your shop work is all done in Pendleton, 50 miles away? A. Yes.

Q. And almost a daily supply was necessary. So you would go back and forth, would you not?

A. Well—

Q. Depending upon the job?

A. Depending upon the job. * * *

Mr. Lundgren was called as a witness for the defendant and testified as follows:

A. * * * On approximately November 1st my brother Harry Lundgren, Mr. Shearer, who was the previous job supervisor at Baker, or superintendent, were asked by me to contact the sheetmetal shops at La Grande and see if arrangements could not be worked out on a cost-plus basis of 10 per cent for completion of the sheetmetal. * * *

(Exhibit 14-A-1 was received in evidence.)

Lundgren then testified that he had a telephone conversation with Lyons about December 3d, "in which he was very worried about getting some money," and testified as follows:

"* * * And I believe at that time, why, I sent him \$800.00. But we also discussed the terms of our agreement, which was to be cost-plus-10 per cent at that time. Now I believe finally I received a letter on December 31st of 1951 (Exhibit 14-A-2) which was in answer to my letter of December 3rd of 1951 (Exhibit 18-A). And that also finally came after a telephone call for money in which I told him I had to have a breakdown and I wouldn't pay a dime until I did, which would substantiate 10 per cent. I believe that I sent him two checks of \$500 each."

(Exhibit 14-A-2 was received in evidence, and Exhibit 18-A was received in evidence as the reply to Exhibit 14-A-1, and 18-B was received in evidence and identified as Lundgren's reply to Exhibit 14-A-2.)

Lundgren then testified to several oral complaints he made to Lyons "about his method of billing and the duplications." And Exhibit 18-C dated June 17, 1952, was received in evidence. * * * He said the nature of those complaints was as to the method of billing, the price, the fact that nothing checked out. "Every place I went to do any checking, why, there seemed to be three times the material that was possible to put into the item. The hours, of course,

I had no way of checking on.” * * * He testified that his estimate of what Lyon’s work would cost, before he came on the job was, at the very most, \$6,000. “And part of that I had put in there for a margin of safety. The smoke vent, for instance, was originally figured at nine hundred seventy-some dollars by the original contractor.”

Q. In your judgment \$6,000 would have been a reasonable figure for all the work that the Relator did?

A. Very much so, the original contract or the original amount of sheetmetal work—not only of the man who got the job, but substantiated by the other subfigures on the whole thing, could not be over \$11,000 in the total job for the sheetmetal.

* * * And at the time that the Relator was called in to do the work that he did, approximately 70 or 75 per cent of the sheetmetal contract work had been performed * * * and almost all the material was on the job. “For instance, the gooseneck vents that there is so much talk about here we placed on the building before he ever got there. And there was an addition under them. They were taken off and set on a base. There was no individual base on them originally.” * * *

Q. You are familiar generally with the normal costs and the time that should be required to do this kind of work that the Relator did?

A. Yes, ordinarily I am.

Q. In your opinion is the number of hours which the Relator claims to have spent doing this work reasonable?

A. In my opinion it is not in any way.

Q. By what margin, if you are prepared to say?

A. If his number of hours were divided by three, I would wonder.

(The Defendant rested.)

Ralph Jones was called as a witness by the plaintiff in rebuttal and testified that he had been in the construction business or in the sheetmetal business seven years and is familiar with construction costs of such a smoke vent as that on the Baker High School. He was asked:

Q. Based upon your experience and your observation of that particular vent, can you give the Court an idea as to what you think the cost of constructing that smoke vent would be?

A. Well, from what I saw of it going through construction, that would be a tough problem. Roughly—I don't know just exactly what it weighed, but I know that it was heavy, and weight would have lots to do with what it would cost to construct it.

Q. Can you answer the question as to about what your estimate of cost of that particular smoke vent would be?

A. Well, it would be pretty hard to do. I would have to do some figuring, that would be all there is to it. But, roughly, I don't think, in my opinion, that it could be built for much less than double over what the man before—it would run a little more than that—over what the other party said. I think it would run close to anyway thirty-six

hundred. But that is an estimate. I wouldn't build it for that, from what I saw of the smoke vent.

Q. Are you familiar with the charges made in this area for the labor of a shopowner and his employees? A. Yes.

Q. Assuming a job such as building a schoolhouse in a town 50 miles away, 50 miles from La Grande to Baker, and the necessity for making parts, doing part of the metal work in the shop and part of it on the job, and running back and forth between there, taking all of that into consideration, what method would you use in charging for such a job if there were no bid on it?

A. If I were doing it myself?

Q. Yes. If you had it for time and material, what would you charge?

A. My charges would be \$4.50 an hour for two men.

Q. That is, you would charge \$4.50 for yourself—

A. That is right, for myself and for my men.

Q. And \$4.50 for your man.

A. And I would charge mileage. On my light truck I charge 10 cents. On my one-ton truck I charge 15 cents.

Q. Was that the charge that you would have made from November of 1951 to the middle of July, 1952? A. Yes, sir.

Mr. Lyons was recalled as a witness, in rebuttal, and testified as follows:

Q. You heard Mr. Lundgren's testimony, Mr.

Lyons, generally. Did you have any telephone conversations with Mr. Lundgren?

A. Yes, I have.

Q. In any telephone conversation did he object to your labor or material charges?

A. No, sir; except for clarification. He says it wasn't clear to him.

Q. Did he object to the amounts? A. No.

Q. Did you ever tell him that there would be no charge for travel time? A. No, sir.

Q. Did you ever agree with him that your contract would be your cost plus 10 per cent?

A. No, sir.

Q. Have you computed it and had it always been right from the start your cost plus 20 per cent? A. Yes, sir.

Q. That is, on material? A. Yes, sir.

Q. You charged no 20 per cent on the labor?

A. No, sir.

On recross-examination, he was handed his letter to Lundgren, Exhibit 14-A-2, in which he said:

“Enclosed are cost sheets for sheetmetal work on Baker High School.” He testified that \$3.75 for his employees' time was not his cost but he put it in his letter, Exhibit 14-A-2, “because of my overhead and all that.”

Q. Does your overhead cost you \$2.00 per hour per man?

A. It comes pretty close to that.

Q. How do you figure that, Mr. Lyons?

A. Well, sir, you take one man or two men. All right. We work eight or nine hours a day. You

make \$2.00 an hour on each man—say one man, which we was operating practically all the time, except my time. That is \$18.00 a day. You can't pay rent, can't pay office help, and take any depreciation or have anything left for your investment on \$18.00 a day.

Q. Did you ever figure your overhead, Mr. Lyons?

A. I have never had a business big enough that I had to really worry about that, because I always did a certain amount of work myself, too.

Q. So you don't know what your overhead is, do you?

A. No, sir.

Q. You don't know whether it is \$2.00 an hour a man or \$20.00 an hour a man or two cents an hour a man, do you?

A. I know it costs to open a business and keep the business open.

Q. When you told Mr. Lundgren that it cost you \$3.75 an hour for your men, you didn't know whether it did or not, did you?

A. Well, I have been in business for a long time, and I have kept costs that way, and I know you have to charge that to show any reasonable profit at all on a job.

Q. In other words, that includes profit, doesn't it?

A. That is right.

Q. Yes.

A. I figure when I hire a man I buy so much merchandise, and I must sell that man's labor for a profit.

Q. And that profit is included in this \$3.75 an hour, isn't it? A. Yes, sir.

Q. How much profit is included in the \$3.75 an hour?

A. Over a year's time you would find that it would be less than 20 per cent.

Q. In other words, 75 cents of that is profit, at least? A. It could be.

Q. But that is just an estimate?

A. That is right.

Q. Because you don't know what your overhead is?

A. That fluctuates quite a bit at that. Over a year's time I can tell you just what it was.

* * * He testified that he started in business in La Grande in June, 1951, and was in the process of moving to La Grande from Portland and actually operated both shops during 1951 and 1952. He then testified as follows:

Q. So that your overhead, even if you knew what it was, would not have been a normal overhead in those two years, would it?

A. Yes, I would say it would still be a normal overhead.

Q. Now, reading on in that letter of December 31st, 1951, you state, "My net on the complete job is slightly less than 10 per cent."

* * *

Q. How did you know?

A. Well, I took my costs right at that time.

Q. You knew right then and there——* * *

A. I took and referred back to my past records.

Q. How did you know in December, 1951, what this complete job was going to amount to?

A. I didn't know what it was going to amount to.

Q. You did not? A. No, sir.

Q. Then you could not honestly say at that time that your net on the complete job was slightly less than 10 per cent, could you? A. No, sir.

Q. But you said it, didn't you?

A. I said my complete net—my net on the complete job is slightly less than 10 per cent to that time or date. That is just what it was running.

Q. How did you know?

A. Because I figured up the materials that I purchased and everything, due to the fact that up to that time we had purchased materials for the smoke vent, aluminum for the building, and everything, but we had no labor in it to speak of at that time, not enough to take care of the job.

Q. At December 31st, 1952, you had practically no labor?

A. We had labor in there, but we had bought more material than we had labor.

Q. Now, referring to that Exhibit 14-A-2 which you have in front of you, how much is on there for material?

A. There is \$437.89, \$230.88, \$274.13, and \$174.13 on the exhaust vent.

Q. That is all?

A. That is all I see right here.

Q. That is about eleven hundred dollars, isn't it?

A. Yes.

Q. How much is that total bill?

A. \$3,322.94.

Q. So one-third of that bill is for material and the rest of it is for labor?

A. I beg your pardon there. We had purchased up almost enough aluminum to do the whole job. And Mr. Lundgren said I couldn't charge for the aluminum until it was delivered on the job. He says he couldn't collect on the materials until they was on the job, he says, whether they was just delivered there or not.

Q. I am referring you now to your previous testimony which you gave just prior to this, in which you said that you knew your profit was less than 10 per cent because you had almost all the material in this bill and practically no labor. Actually, you had twice as much labor in this bill as you had material, didn't you?

A. On this bill here, yes.

Q. Yes. And this is the bill you were talking about, isn't it?

A. That is right, yes.

Q. And this is the bill that you said your net was slightly less than 10 per cent?

A. Yes.

Q. And you were sure of it because most of it was material. Most of it is not material, is it?

A. Well, we had purchased material. It was there.

Q. That is not on this bill, is it?

A. That is not on this bill.

Q. And you didn't know that your net was less than 10 per cent?

A. But your inventory is still included in your overhead.

Q. Oh, you were including inventory in overhead? A. Yes.

Q. Then that is an explanation of how you can arrive at a figure of 10 per cent, if you include inventory in overhead?

The Court: I think, Counsel, you could point out these discrepancies just as well by brief as by examining the witness.

Mr. Reinhardt: I would like to ask just one more question, your Honor.

The Court: All right.

Q. (By Mr. Reinhardt): Now, you deny having made an agreement with Mr. Lundgren to do this job at a 10-per-cent profit, do you?

A. That is right.

Q. In view of that denial, why did you refer to any 10-per-cent figure in this letter of December 31st, 1951?

A. I said it is running slightly less than 10 per cent.

Q. That had nothing to do with any deal to do this job for 10 per cent?

A. Absolutely not, because I couldn't do the job for 10 per cent net profit.

Q. Do you make 10 per cent on your business?

A. Yes. I sure haven't done it the last two years, though.

Q. Beg pardon?

A. I haven't done it the last two years.

Q. You have not? A. No, sir.

Q. How much have you made on your business in the last two years?

A. In 1951 I went eight hundred dollars in the hole. Last year—I have two children and my wife as dependents, and I paid less than \$100 for income tax. That can be criticized any way you want to.

Q. That was last year?

A. That was last year, '52.

Q. What about 1953?

A. 1953, I haven't checked it yet.

Q. You mean you have to check to determine your rate of profit?

A. Yes, sir. This is a little different business than a merchandise store. We have jobs——

Q. You didn't have to check in '51 or '52, though, to find your overhead cost? You knew that?

A. I knew it from previous experience, yes.

Mr. Reinhardt: That is all.

During the recess referred to on page 10 of this abbreviated record, the Relator revised his Contention IV appearing on page 5 of the Pretrial Order in the following respects:

The figure on Line 6 of \$4,773.25 will be changed to \$4,464.52.

The figure \$954.65 on that same line will be changed to \$892.90.

The figure on Line 8 of \$145.87 will be changed to \$133.39.

The figure on Line 10 of 58 will be changed to 52.

The figure on Line 12 of 580 will be changed to 520.

The figure on that same line, 975½ hours, will be changed to 877½ hours.

The figure on Line 13 of 1,423½ hours will be changed to 1,285½ hours.

And on page 4 of the pre-trial order, Relator's Contention No. 1 will be changed as follows: The figure \$5,303.79 appearing on Lines 6 and 7 will be changed to \$3,999.58.

The following exchange occurred between counsel:

Mr. Dunn: I have one more question to ask. Can we stipulate that if the Court finds the plaintiff is entitled to an attorney's fee what a reasonable attorney's fee would be?

Mr. Reinhardt: I certainly cannot stipulate to the amount you are asking for.

(Discussion off the record.)

Mr. Dunn: It is stipulated that if we recover the amount originally set forth in the pre-trial order \$1,000 is a reasonable amount as attorney's fees.

Mr. Reinhardt: Yes.

[Endorsed]: Filed February 16, 1955.